



## Case Western Reserve Journal of International Law

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Volume 52 | Issue 1

Article 28

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2020

### Introducing Private-Property Rights to Cuba: How Cuba's New Constitution Paves the Way for Economic Growth

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# INTRODUCING PRIVATE-PROPERTY RIGHTS TO CUBA: HOW CUBA'S NEW CONSTITUTION PAVES THE WAY FOR ECONOMIC GROWTH

Renee Monzon\*

*On February 24, 2019, Cuba adopted a new Constitution.<sup>1</sup> The new Constitution formally recognizes private-property ownership. From the beginning of Socialism's impact on Cuba, private-property ownership had been legally abolished until Fidel Castro stepped down from power in 2008.<sup>2</sup> This new Constitution shows a departure from the socialist grasp on the economy. Cuba likely recognizes that private-property ownership is fundamental to economic growth in capitalist countries and now seeks to benefit from the growth that accompanies a system of private-property rights. Cuba is not the first socialist country to embark on a process of property privatization. This paper will look at how post-communist countries have implemented property rights in the past and apply the prevailing economic theories to the process Cuba is going through now.*

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- 1 See Geoff Thale & Teresa García Castro, *Cuba's New Constitution, Explained*, WASH. OFFICE OF LATIN AM. (Feb. 26, 2019), <https://www.wola.org/analysis/cubas-new-constitution-explained/> [<https://perma.cc/EY4Q-VCDC>].
- 2 See Carmen Sesin, *Cuba After Castro: How Much Change, How Quickly*, NBC NEWS (Nov. 27, 2016), <https://www.nbcnews.com/storyline/fidel-castrosdeath/cuba-after-castro-how-much-change-how-quickly-n688681> [<https://perma.cc/76XM-XDLE>] (stating when Fidel Castro stepped down from power); MARK P. SULLIVAN, CUBA: U.S. POLICY IN THE 116TH CONGRESS 6 (2019), <https://crsreports.congress.gov/product/pdf/R/R45657> [<https://perma.cc/E8FS-ZSXP>] (noting a new provision in Cuba's Constitution is the reintroduction of private property rights).

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## INTRODUCTION

Cuba has embarked on a process of partial privatization in an attempt to reinvigorate an economy that suffers from some of the highest levels of inequality and lowest rates of growth in the world.<sup>3</sup> Cuba's recognition of private-property rights shows a departure from the previous ownership system established under Fidel Castro's communist regime. Their attempts to create an economic market that

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3. See Nora Gámez Torres, *Cuba Is A Lot Poorer Than The Government Reports, A New Study Shows*, MIAMI HERALD (Jan, 22, 2018), <https://www.miamiherald.com/news/nation-world/world/americas/cuba/article195681589.html> [<https://perma.cc/F42F-QNH3>].

welcomes private-property ownership indicates a trend towards capitalist economic policies. While not an impossible transition, this privatization process is fraught with dangers, as exemplified by other countries who have gone through similar patterns on the road to post-socialist economic growth.

Several decades ago, a handful of countries pursued the Communist ideals laid out by Marx and Engels.<sup>4</sup> While utopian communism was never perfectly achieved, most of these countries devolved into socialist systems.<sup>5</sup> Socialist countries strive towards social ownership over the means of production, which often means consolidation of property in the state's hands.<sup>6</sup> This communal ownership, however, often leads to depletion of resources and economic decline.<sup>7</sup> When socialist countries realize these problems, they often turn to policies that tend to produce growth in capitalist economies.<sup>8</sup> Property rights are central to most modern economic systems and are a key feature of the capitalist economy.<sup>9</sup> In abandoning socialist economic structures established during communist rule, the recognition of property rights and privatization of state-owned assets are some of the first reforms implemented.<sup>10</sup> And now, Cuba is experimenting with this same process of instituting capitalist economic theories and private-property rights in a socialist economy. This paper will analyze patterns and theories about the intersection of private-property rights and economic growth and apply them to Cuba's unique circumstances.

First, this paper will look at the history of Cuba, particularly how their political and economic systems have evolved over its time as a sovereign nation. Cuba is a geographically small country with a deep,

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4. See David Floyd, *What's the Difference between Communism and Socialism?*, INVESTOPEDIA (Feb. 11, 2019), <https://www.investopedia.com/ask/answers/100214/what-difference-between-communism-and-socialism.asp> [https://perma.cc/ADX7-SPC6].
  5. See *id.*
  6. See *id.*
  7. See *Lack of Property Rights*, ECONOMICS ONLINE, [https://www.economicsonline.co.uk/Market\\_failures/Lack\\_of\\_property\\_rights.html](https://www.economicsonline.co.uk/Market_failures/Lack_of_property_rights.html) [https://perma.cc/WV39-BWQQ].
  8. See, e.g., Paul R. Gregory, *Why Socialism Fails*, HOOVER INST. (Jan. 10, 2018), <https://www.hoover.org/research/why-socialism-fails> [https://perma.cc/A3GU-FZDJ].
  9. See Sean Ross, *How are Capitalism and Private Property Related?*, INVESTOPEDIA, <https://www.investopedia.com/ask/answers/040615/how-are-capitalism-and-private-property-related.asp> [https://perma.cc/H6XB-4XZC] (last updated June 25, 2019).
  10. See E.S. Savas, *Privatization in Post-Socialist Countries*, 52 PUB. ADMIN. REV. 573, 573 (1992).

complicated history. An ally of the Soviet Union during the Cold War,<sup>11</sup> Cuba retained its communist system long after the fall of Communism in much of the world.<sup>12</sup> Their communist roots played a vital role in the shaping of their current socialist system. And learning how Cuba's current economic system formed is essential for understanding how theories of privatization and economic growth will apply to its unique circumstances.

The second section of this paper will discuss the most recent change in Cuba's political atmosphere: the adoption of a new Constitution. In June of 2018, Cuba took a bold step forward. The National Assembly put together a committee to draft a new Constitution.<sup>13</sup> Amongst the many changes made in the proposed constitution, it recognized private property as a form of ownership.<sup>14</sup> This first draft also reaffirmed the socialist system but diminished its references to communist ideals.<sup>15</sup> The proposed Constitution then went through a period of public comment and revisions.<sup>16</sup> After some notable changes, the Constitution was adopted by national referendum in February of 2019.<sup>17</sup>

The changes found in this new Constitution fall in line with the evolution that property rights have undergone in Cuba over the last several decades. And the third section of this paper will look at this development of property rights in Cuba. For decades, private-property ownership was a foreign concept in Cuba. All means of production were

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11. *History of Cuba*, THE NATIONS ONLINE, <https://www.nationsonline.org/oneworld/History/Cuba-history.htm> [<https://perma.cc/U7PV-BUUS>] [hereinafter *History of Cuba*].
  12. *See id.*
  13. *See* Guillermo Nova, *Cuba's Legislature Approves Constitutional Reforms*, HAVANA TIMES (July 23, 2018), <https://havanatimes.org/features/cubas-legislature-approves-constitutional-reforms/> [<https://perma.cc/49XY-EJGZ>].
  14. *Communist-run Cuba to Recognize Private Property in New Constitution*, REUTERS (July 14, 2018, 6:14 PM), <https://www.reuters.com/article/us-cuba-politics/communist-run-cuba-to-recognize-private-property-in-new-constitution-idUSKBN1K4108> [<https://perma.cc/S9QT-NVZ6>].
  15. *See* Andrés Oppenheimer, *Cuba's New Constitution is Worse Than the Old One*, MIAMI HERALD (Aug. 11, 2018, 5:57 PM), <https://www.miamiherald.com/news/local/news-columns-blogs/andres-oppenheimer/article216527420.html> [<https://perma.cc/LCR5-EQSL>].
  16. *See* Sarah Marsh & Nelson Acosta, *Cuban Lawmakers Approve New Constitution Which Heads to Referendum*, REUTERS (Dec. 22, 2018, 5:00 PM), <https://www.reuters.com/article/us-cuba-constitution/cuban-lawmakers-approvenew-constitution-which-heads-to-referendum-idUSKCN1OL0OF> [<https://perma.cc/8FNT-7JK5>].
  17. *See* Andrea Rodriguez, *Amid Crisis, Cuba Plans Revamp of State and Legal System*, ASSOCIATED PRESS (Mar. 14, 2019), <https://www.apnews.com/ee5ea44978d544cf8720abd11a99b99d> [<https://perma.cc/3YAT-2H82>].

owned by the state.<sup>18</sup> We first saw this regime deteriorate when Cuba started allowing for certain forms of property ownership in 2011.<sup>19</sup> The National Assembly enacted a statute that allowed for Cuban citizens to own homes.<sup>20</sup> Even though the government heavily regulates this ownership, it created a housing market in Cuba, an economic sector that never had a reason to exist before.<sup>21</sup> When Cuba's new Constitution and its recognition of private property is viewed in the context of its evolving rights and markets, we can best analyze avenues for future economic growth in Cuba.

While Cuba remains reluctant to admit any trends away from a socialist economy and towards Capitalism, some recognized forms of ownership in the new Constitution parallel Western understandings of property rights.<sup>22</sup> The fourth section of this paper will first look at traditional definitions of property rights in capitalist countries. Recognition and legal protection of private-property rights is essential to capitalist economies.<sup>23</sup> This section will then look at the types of property ownership recognized under the new Cuban Constitution. The ownership forms Cuba recognized deviate from socialist conceptions of property ownership and create fodder that could lead to economic growth.

Cuba is not the first country to use privatization as a means to achieve economic growth in a system crippled by failed Communism.<sup>24</sup> The fifth section of this paper will look into theories of economic growth and patterns that have arisen from other post-communist countries who went through this same transition. Theories on what set of circumstances leads to the best growth extend to the speed of transition, types of reforms, social atmosphere, and legal framework.

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18. See William N. Trumbull, *The Cuban Economy*, COLLEGE OF CHARLESTON (Aug. 10, 2017), <http://cubaonthehorizon.cofc.edu/the-cuban-economy/> [https://perma.cc/6SE4-QLNF].
  19. See Damien Cave, *Cuba to Allow Buying and Selling of Property, with Few Restrictions*, N.Y. TIMES (Nov. 3, 2011), <https://www.nytimes.com/2011/11/04/world/americas/cubans-can-buy-and-sell-property-government-says.html> [https://perma.cc/U923-LQGL].
  20. See *id.*; Decreto-Ley 288, GACETA OFICIAL, G.O. Ext. No. 35, at 359 (Oct. 28, 2011), available at <http://cafeuerte.com/documentos/1308-documentos-decreto-ley-288-y-resoluciones-para-la-compraventa-de-casas-en-cuba/> [https://perma.cc/V66H-BR5J].
  21. See Philip Peters, *Cuba's New Real Estate Market*, THE BROOKINGS INST., at 1-2 (Feb. 2014), available at <https://www.brookings.edu/wp-content/uploads/2016/06/Phil-Peters-Cubas-New-Real-Estate-Market.pdf> [https://perma.cc/T3QD-XF46].
  22. See Thale & Castro, *supra* note 1.
  23. See Ross, *supra* note 9.
  24. See generally Savas, *supra* note 10.

While the best source for analyzing post-communist economic reform comes from the countries that emerged after the Soviet Republic collapsed, Cuba's circumstances are fundamentally unique. This paper will also analyze property-ownership theories specific to Latin America. Countries in Latin America are subject to a unique mix of conditions that change how property rights and capitalist economic policies are applied.<sup>25</sup> Cuba is making significant shifts in their economy, but they are not attempting to build a new political and economic system from scratch. While post-Soviet countries provide relevant guidance, recommendations for Cuba must arise out of a blend of post-communist theories and Latin American experiences.

The last section of this paper will then apply relevant theories about the intersection of private-property rights and economic growth to Cuba's unique circumstances. While the changes Cuba has made are significant, the government will have to continue to create a stronger economic system and legal framework to support private property rights if they want to see consistent economic growth. The manner in which reforms are currently being implemented are neither decreasing wealth inequality nor increasing lower-class purchasing power. On this trajectory, Cuba risks the formation of a plutocracy instead of the middle-class growth they were seeking. This section will provide further recommendations and guidance for the Cuban government for how to best utilize private-property rights for economic growth. Ultimately, Cuba's best option for achieving economic growth will require them to modify their legal and political frameworks to accompany this new constitutional recognition of private-property rights.

## I. BRIEF HISTORY OF CUBA

Cuba's known history dates back to the Spanish colonization of the island in the fifteenth century, but Cuba ultimately gained formal independence in 1902.<sup>26</sup> Since then, Cuba has undergone several revolutions and regime changes.<sup>27</sup> Even after Cuba ceased being an American protectorate, the United States retained a great amount of control over Cuba.<sup>28</sup> Cuba began to come into its own during the revolution in 1933, when Fulgencio Batista became the face of Cuban leadership and politics.<sup>29</sup> Through several communist puppet-presidents

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25. See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000).

26. *History of Cuba*, *supra* note 11.

27. See generally *id.*

28. *Id.*

29. *Id.*

and a presidential term of his own, Batista controlled Cuban politics.<sup>30</sup> The 1940 Constitution sought to enforce radical progressive ideals, such as the right to labor and healthcare.<sup>31</sup> From 1944 to 1952, the opposing political party in Cuba gained control of the presidency.<sup>32</sup> During this time, Cuba saw economic growth, an influx of foreign investment, and an increased standard of living.<sup>33</sup> Batista returned to Cuba in 1952, regaining control of the country through a military coup.<sup>34</sup> He remained in control of the Cuban government until 1958.<sup>35</sup> During that time, Batista revoked many political liberties and outlawed the Cuban Communist Party.<sup>36</sup>

Becoming unsettled with the corrupt political system, Fidel Castro spearheaded another Cuban Revolution starting in 1956.<sup>37</sup> Castro officially assumed the position of Prime Minister in 1959.<sup>38</sup> The United States initially supported Castro's efforts, viewing it as an opportunity for democracy to take hold in Latin America.<sup>39</sup> However, when Castro legalized the Communist Party, summarily executed leaders of the old regime, and expropriated American property in Cuba, tensions quickly rose and the United States retaliated with economic sanctions against Cuba.<sup>40</sup> During the Cold War, Cuba aligned itself with the Soviet

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30. *Id.*

31. See CONSTITUCION DE LA REPUBLICA DE CUBA (1940) (Cuba), *translated in* I CONSTITUTIONS OF NATIONS 610–11, 625 (Amos J. Peaslee ed. & trans., 2d ed. 1956) [hereinafter 1940 Constitution].

32. *History of Cuba*, *supra* note 11.

33. *Id.*

34. *Id.*

35. *Fulgencio Batista*, *ENCYCLOPÆDIA BRITANNICA*, <https://www.britannica.com/biography/Fulgencio-Batista> [<https://perma.cc/XC7M-DP35>].

36. DANIEL JAMES, CUBA: THE FIRST SOVIET SATELLITE IN THE AMERICAS 86 (1961).

37. Rebecca Sanchez, Elissa Curtis & Rachelle Klapheke, *Remembering the Cuban Revolution*, MSNBC (July 28, 2015), <http://www.msnbc.com/msnbc/remembering-fidel-castro-and-the-cuban-revolution#slide1> [<https://perma.cc/G27W-JX7W>].

38. *Id.*

39. *Castro and Communism in Cuba*, UNIV. OF GRONINGEN, <http://www.let.rug.nl/usa/outlines/history-1963/america-in-the-modern-world/castro-and-communism-in-cuba.php> [<https://perma.cc/4R4H-YB3W>].

40. *Cuba Sanctions*, U.S. DEP'T OF STATE, <https://www.state.gov/e/eb/tfs/spi/cuba/> [<https://perma.cc/59CJ-6TBB>].



Union, providing troops in return for economic support.<sup>41</sup> After the collapse of the Soviet Union, Cuba went through a period of intense economic hardship, but began to recover after aligning itself with countries like Venezuela.<sup>42</sup> Despite these changes, Cuba remained a communist regime, controlled by the Communist Party in a “one party – one state” system.<sup>43</sup>

Serving as prime minister, president, and leader of the Communist Party, Fidel Castro retained his position of power until he stepped down in 2008.<sup>44</sup> He appointed his brother, Raúl Castro, to serve as President and head of the Communist Party.<sup>45</sup> When Raúl Castro took office, he promised greater freedoms and fewer restrictions.<sup>46</sup> While not fulfilling all of his promises, Cuba did undergo several changes during his tenure as President.<sup>47</sup> Raúl Castro increased access for tourism, opened channels for investment and trade, improved relations with other countries and international organizations, and worked with President Obama to mend the divide between the U.S. and Cuba.<sup>48</sup> Though Raúl Castro still serves as the leader of the Communist Party, he stepped down from his role as president and Miguel Diaz-Canel was elected in 2018.<sup>49</sup>

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41. Berta Esperanza Hernández Truyol, *Out in Left Field: Cuba's Post-Cold War Strikeout*, 18 FORDHAM INT'L L.J. 15 (1994) (discussing how the Soviet Union provided Cuba with economic support); Jorge I. Domínguez, *U.S.-Cuban Relations: From the Cold War to the Colder War*, 39 J. OF INTERAMERICAN STUDIES AND WORLD AFFAIRS 49 (1997) (discussing how Cuba and the Soviet Union were allied in deploying troops).
  42. Mimi Whitefield, *Cuba is Slowly Losing a Lifeline as Venezuela Collapses*, L.A. TIMES (Oct. 3, 2019), <https://www.latimes.com/world-nation/story/2019-10-03/venezuela-meltdown-us-sanctions-batter-cuba> [<https://perma.cc/FBR9-EZDZ>].
  43. *History of Cuba*, *supra* note 11.
  44. Phil McCausland, *Former Cuban Leader Fidel Castro Dead at 90*, NBC NEWS (Nov. 26, 2016), <https://www.nbcnews.com/storyline/fidel-castro-death/former-cuban-president-fidel-castro-dead-90-cuban-tv-n688511> [<https://perma.cc/NVW5-CABF>].
  45. *Id.*
  46. *Id.*
  47. CONG. RESEARCH SERV., R44822, CUBA: U.S. POLICY IN THE 115TH CONGRESS (2019).
  48. *Id.*; Lauren Duffy & Carol Kline, *Complexities of Tourism Planning and Development in Cuba*, TAYLOR AND FRANCIS GROUP (Mar. 25, 2018), <https://www.tandfonline.com/doi/full/10.1080/21568316.2018.1440830> [<https://perma.cc/XZ7S-8VDP>]; Daniel P. Erikson, *Raul Castro*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/biography/Raul-Castro> [<https://perma.cc/K5L4-R9M8>].
  49. Patrick Oppmann & Alanne Orjoux, *Miguel Diaz-Canel Named Cuba's New President*, CNN (Apr. 20, 2018),

Over the years, Cuba has had various different constitutions, the most recent one being enacted in 1976.<sup>50</sup> This Constitution, taking effect during Fidel Castro's reign, continually emphasizes a system guided by the communist principles of Marx, Engels, and Lenin.<sup>51</sup> To this day, the Communist Party remains the seat of power in the Cuban political system, and the head of the party—the First Secretary—serves as the de facto leader of Cuba.<sup>52</sup>

Since Fidel Castro's death, Cuba has seen the largest expansion of political and economic freedoms in decades. While these changes are far from dramatic, they do indicate Cuba's willingness to enter the modern international political system and drift away from the communist ideologies that controlled their society in the past.

## II. CUBA'S NEW CONSTITUTION

Cuba's most notable and recent political activity was the adoption of a new Constitution. In June of 2018, a constitutional commission proposed a new Constitution that would bring a variety of changes to the island country.<sup>53</sup> The draft of the constitution was approved by the National Assembly in July of 2018.<sup>54</sup>

The draft constitution's proposed changes ranged from property rights to political structure to personal freedoms.<sup>55</sup> Under the draft constitution, marriage was defined as a relationship between "two people" instead of between a man and a woman.<sup>56</sup> The draft added the presumption of innocence in criminal cases and the right to habeas

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<https://www.cnn.com/2018/04/19/americas/cuba-new-president-named/index.html> [https://perma.cc/WW62-YEJH].

50. See generally CUBA'S CONSTITUTION OF 1976 WITH AMENDMENTS THROUGH 2002, translated by Pam Falk, Milagros M. Gavilan, & Anna I. Vellve Torras, Oxford University Press (July 27, 2018), available at [https://www.constituteproject.org/constitution/Cuba\\_2002.pdf?lang=en](https://www.constituteproject.org/constitution/Cuba_2002.pdf?lang=en) [https://perma.cc/2YGV-6UWY].
51. *Id.* at 7.
52. Sesin, *supra* note 2; *Raul Castro to Lead Cuba's Communist Party until 2021*, FRANCE 24 (Apr. 19, 2018), <https://amp.france24.com/en/20180419-raul-castro-leadership-cuba-communist-party-2021-diaz-canel> [https://perma.cc/74VS-4ZTZ].
53. See generally Marc Frank, *Cuba's proposed new constitution: what will change*, REUTERS (Aug. 13, 2018), <https://www.reuters.com/article/us-cuba-constitution-explainer/cubas-proposed-new-constitution-what-will-change-idUSKBN1KY1UC> [https://perma.cc/37PX-EDYN].
54. Nova, *supra* note 13.
55. *Id.*
56. *Id.*

corpus.<sup>57</sup> Additionally, it provided that people could sue the state for damages and negligence.<sup>58</sup> Under political reforms, it added the role of an appointed prime minister to manage the day-to-day affairs of the government.<sup>59</sup> Additionally, the draft provided that a new set of governors will replace the Communist Party first secretaries as the highest official in Cuba's 15 provinces.<sup>60</sup> The tone of the Constitution also shifted. The draft did not reference past goals of reaching "utopian communism."<sup>61</sup> The only references to Communism were in the continued establishment of the Communist Party as the only legal political party and its irrevocable role in guiding the nation.<sup>62</sup> Instead, the draft constitution continually established Socialism as the political and social system of Cuba.<sup>63</sup>

The proposed Constitution also laid out a series of economic reforms. The text of the draft Constitution established an economy based on "socialist ownership,"<sup>64</sup> but some elements of the draft actually showed a trend away from socialist policies. For the first time, the proposed Constitution recognized the market as a fact of economic life,<sup>65</sup> though the language allowed the government to retain ultimate control over the market and countermand it at will.<sup>66</sup> Additionally, private businesses and non-farm cooperatives were designated as legitimate economic activity, and the role of foreign investment was upgraded from secondary to "important" or "fundamental."<sup>67</sup>

Most importantly, the proposed constitution recognized private property as a form of ownership in Cuba.<sup>68</sup> Article 21 of the draft constitution lists and defines six types of property ownership under the

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57. Frank, *supra* note 53.

58. *Id.*

59. *Id.*

60. Rodriguez, *supra* note 17

61. Frank, *supra* note 53.

62. *Id.*

63. See Proyecto de Constitución de la República de Cuba [Proposed Constitution] Jul. 22, 2018 (Cuba), *translated in* BILL OF THE CONSTITUTION OF THE REPUBLIC OF CUBA (Maria del Carmen Gress, trans., HeinOnline World Constitutions Illustrated Library 2018) [hereinafter Proposed Constitution].

64. *Id.* art. 20.

65. Frank, *supra* note 53; *see also* Proposed Constitution, *supra* note 56, art. 20.

66. Frank, *supra* note 53.

67. *Id.*

68. Proposed Constitution, *supra* note 63, art. 21.

Economic Foundations section.<sup>69</sup> Even though this draft recognized private property, it followed the definitions of property ownership with a qualifier that the state encourages property ownership of a “more social character,”<sup>70</sup> indicating the continued establishment of socialist principles. Article 22 went on to establish that the state will regulate ownership to guarantee that the concentration of ownership in non-state persons “does not exist.”<sup>71</sup> So even though property rights are being recognized, the government is attempting to retain strong control over them.

After the National Assembly approved this draft, the proposed constitution was open for a period of public comment from August 13 to November 15.<sup>72</sup> Over this three-month period, 7 million Cubans gathered at over 100,000 locations to comment on the proposed Constitution.<sup>73</sup> The hundreds of thousands of proposals and opinions were presented to the constitutional commission for review.<sup>74</sup> Based on these comments, the commission made 760 changes to the first draft of the Constitution.<sup>75</sup>

While the initial draft of the Constitution showed bold steps away from Cuba’s communist roots, the revised version indicates that Cuba took a step back towards their old ways. Notably, Cuba reinserted the goal of “advancing towards a communist society” after its absence from the first draft sparked public outcry, according to state-run media.<sup>76</sup> The updated draft also restricted some social freedoms the first draft provided for, removing the language that would have paved the way for same-sex marriage and weakening the provisions that provided for

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69. *Id.*

70. *Id.*

71. *Id.* art. 22.

72. National News Staff, *A Constitution to Serve Cuba*, GRANMA (July 23, 2018), <http://en.granma.cu/cuba/2018-07-23/a-constitution-to-serve-cuba> [<https://perma.cc/Q5VQ-UWVG>].

73. Mimi Whitefield, *Cuba Asked For Public Feedback On A New Constitution. Now It's Deciding Which Suggestions to Include*, MIAMI HERALD (Dec. 3, 2018), <https://www.miamiherald.com/news/nation-world/world/americas/cuba/article221917690.html> (last accessed March 17, 2019).

74. *Id.*

75. Nelson Acosta & Sarah Marsh, *Cuba Reinserts Goal Of ‘Advancing Toward A Communist Society’ Into New Constitution Draft After Public Outcry*, INDEPENDENT (Dec. 21, 2018), <https://www.independent.co.uk/news/world/americas/cuba-communism-constitution-draft-raul-castro-public-outcry-referendum-a8694956.html> [<https://perma.cc/5SW3-CB6Q>].

76. *Id.*

religious freedoms.<sup>77</sup> During the comment period, the government even invited Cuban exiles to make suggestions for the Constitution draft.<sup>78</sup> But the final version does not expand the role of private property or the political rights of citizens residing outside the island, which were two of the most popular demands among Cubans living abroad.<sup>79</sup>

With regard to property rights, the constitutional commission revised the section about the accumulation of property.<sup>80</sup> In the first draft, the constitution banned the accumulation of property, stating that it “does not exist.”<sup>81</sup> The revised Constitution simply stipulates that the state must regulate the accumulation of property.<sup>82</sup> Most importantly for this paper, the updated draft further restricted the original definition of private property. The final document includes a clarification to emphasize that private property only has “a complementary role in the [planned socialist] economy.”<sup>83</sup> While there were several other changes, these are the most relevant and important for the analysis of Cuba’s future economic growth.

On December 22, 2018, the National Assembly approved the updated text of the Constitution and released it to the public as the

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77. The Associated Press, *Cuba Eliminates Language About Same-Sex Marriage from Draft of New Constitution*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/world/americas/cuba-gay-marriage-constitution.html> [perma.cc/9L9N-CN89]; Diana Chandler, *Cuba’s Proposed Constitution Cuts Religious Freedoms*, BAPTIST PRESS (Feb. 18, 2019), <http://www.bpnews.net/52436/cubas-proposed-constitution-cuts-religious-freedom> [https://perma.cc/2X59-TYDH]; Thomas Williams, *Religious Freedom Commission Slams Draft of New Cuban Constitution*, BREITBART (Dec. 12, 2018), <https://www.breitbart.com/latin-america/2018/12/12/religious-freedom-commission-slams-draft-of-new-cuban-constitution/> [https://perma.cc/5CNU-7EW2].
78. Nora Gamez Torres, *Cuba invites exiles to take part in debate for proposed changes to island’s Constitution*, MIAMI HERALD (Aug. 3, 2018), <https://www.miamiherald.com/news/nation-world/world/americas/cuba/article216065045.html> [https://perma.cc/4JJH-NN94].
79. Nora Gamez Torres, *Cuba Could Have a New Government Soon if Draft Constitution Takes Effect*, MIAMI HERALD (Jan. 5, 2019), <https://www.miamiherald.com/news/nation-world/world/americas/cuba/article223980880.html> [https://perma.cc/7G3T-PDQS].
80. Marsh & Acosta, *supra* note 16.
81. Proposed Constitution, *supra* note 63, art. 22.
82. Marsh & Acosta, *supra* note 16.
83. Nora Gamez Torres, *Government Could Change in Cuba*, VALLEY NEWS (Jan. 6, 2019), <https://www.vnews.com/Cuba-could-have-a-new-government-soon-if-draft-constitution-takes-effect-22600356> [https://perma.cc/RZN2-SZP4].

final version of the Constitution that would be voted on.<sup>84</sup> Cuba held a national referendum for the Constitution on February 24, 2019.<sup>85</sup> The following day, state-run media reported that the Cuban population passed the new Constitution with a 78% approval rating.<sup>86</sup> In the wake of the Constitution's passage, Cuban legal experts expect that the National Assembly will have to enact between 60 and 80 new laws over the next two years to adapt to the changes the new Constitution requires.<sup>87</sup> Meanwhile, Cuban citizens remain hopeful that this new Constitution will bring big, positive changes to the political system and state structure.<sup>88</sup>

### III. EVOLVING PROPERTY RIGHTS IN CUBA

The Cuban population has not always suffered from the deprivation of private-property rights. The 1940 Constitution, established under Batista, protected property rights, providing that “[t]he Cuban Nation recognizes the existence and legitimacy of private property in its broadest concept as a social function and without other limitations than those which, for reasons of public necessity or social interest, are established by law.”<sup>89</sup> Under this regime, Cuban citizens enjoyed the right to own and use property without government interference.<sup>90</sup> These constitutional guarantees were acceptable under international law and consistent with democratic legal principles of the time.<sup>91</sup>

#### A. *Property Rights Under the Castro Regime*

Cuba's constitutional property rights began to deteriorate when Fidel Castro seized control of the island at the beginning of 1959.<sup>92</sup> Castro's first attack on property rights occurred when he amended

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84. Marsh & Acosta, *supra* note 16.

85. *Id.*

86. Rodriguez, *supra* note 17. Though, this is a relatively low passage rate for Cuba, with most other measures with passage rates over 90%. *Id.*

87. *Id.*

88. *Id.*

89. 1940 Constitution, *supra* note 31, at 626, art. 87.

90. Jose A. Ortiz, *The Illegal Expropriation of Property in Cuba: A Historical and Legal Analysis of the Takings and a Survey of Restitution Schemes for a Post-Socialist Cuba*, 22 LOY. L.A. INT'L & COMP. L. REV. 321, 326–27 (2000).

91. *Id.* at 327.

92. *Id.* at 328 (stating that though constitutional property rights were deteriorated in the past, Castro initially reestablished them then promptly returned them to a deteriorated state).

Article 24 of the Constitution on government confiscation of property.<sup>93</sup> The amended version allowed for discriminatory takings of property and worked as a mechanism to punish all political opposition.<sup>94</sup>

A month after assuming control, Castro officially repealed the 1940 Constitution and established the Fundamental Law.<sup>95</sup> Within the following two years, the government nationalized nearly all private property.<sup>96</sup> First, the Agrarian Reform Act converted all large agricultural estates into state-owned farms.<sup>97</sup> And those who were allowed to keep their land were severely restricted in the use and transference of the property.<sup>98</sup> Second, the Castro Government further amended Article 24 to expand the classes of persons that property could be expropriated from.<sup>99</sup> Additionally, the amended text deprived victims of any judicial procedure to challenge the expropriation and removed the original guarantee of compensation for these government takings.<sup>100</sup> Third, Castro enacted Law No. 851, which forcibly expropriated all businesses United States citizens owned in Cuba.<sup>101</sup> Fourth, Castro passed Law No. 890 in October of 1960, which confiscated virtually all Cuban-owned businesses and nationalized all Cuban-owned industries.<sup>102</sup>

To solidify the goals of the communist revolution in Cuba, Castro's government enacted the Constitution of 1976.<sup>103</sup> Chapter I, Article 15 defined property under this Constitution, establishing that all property is socialist state property, belonging to the entire people of Cuba.<sup>104</sup> This Constitution placed almost all land and industry in the government's hands and removed all private-property ownership from

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93. *Id.*

94. *Id.*

95. Lina Forero-Nino, *The Cuban Government Approves Guidelines to Reform Cuba's Economic Model and Develops an Implementation Strategy*, 17 L. & BUS. REV. AM. 761, 764 (2011).

96. *See* Ortiz, *supra* note 90, at 328–32.

97. *Id.* at 329.

98. *Id.* at 330.

99. *Id.*

100. *Id.* at 331.

101. *Id.* at 332; Ley Numero 851 [Law No. 851], GACETA OFICIAL, Special Ed., No. 22 (July 31, 1960) (Cuba).

102. *See* Ortiz, *supra* note 90, at 322; Ley Numero 890 [Law No. 890], GACETA OFICIAL, Special Ed., No. 25 (Oct. 31, 1960) (Cuba).

103. *See* Ortiz, *supra* note 90, at 322.

104. Constitución de la Republica de Cuba (1976), *translated in* V CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1 (Albert P. Blaustein & Gisbert H. Flanz eds., 1996) [hereinafter 1976 Constitution].

the scope of constitutional protection.<sup>105</sup> This system remained in place until Fidel Castro stepped down from power in 2008.<sup>106</sup> Over the past decade, the Cuban government has begun to depart from the communist ideals that justified Castro's gross violations of property rights.

*B. Legalization of Private Property by Statute*

In one of Raul Castro's most important market reforms of his presidency, Cuba recognized private-property ownership for the first time in decades.<sup>107</sup> In 2011, the National Assembly passed Decree-Law 288, allowing for citizens to legally transfer titles to their homes for the first time since 1959.<sup>108</sup> Granted, this statute still restricts home ownership and property transfers.<sup>109</sup> People are only allowed to own two homes, one to live in and a vacation home.<sup>110</sup> Additionally, all sales are subject to a government tax on the property sale.<sup>111</sup> Scholars indicate that allowing the free trade of property is a huge step towards Capitalism.<sup>112</sup> On the other hand, Cuban officials claim that this new law still maintains Socialism by containing provisions that control both speculation and concentration of wealth.<sup>113</sup> Nevertheless, with a housing

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105. Ortiz, *supra* note 90, at 333.

106. Anthony Faiola, *In Cuba, the Castro Era Ends this Week as Raúl Steps Down as Ruler*, WASH. POST (Apr. 17, 2018), [https://www.washingtonpost.com/world/the\\_americas/for-the-first-time-in-six-decades-cuba-wont-be-led-by-a-castro/2018/04/17/fldf8b3c-3e61-11e8-955b-7d2e19b79966\\_story.html](https://www.washingtonpost.com/world/the_americas/for-the-first-time-in-six-decades-cuba-wont-be-led-by-a-castro/2018/04/17/fldf8b3c-3e61-11e8-955b-7d2e19b79966_story.html) [https://perma.cc/4CZQ-L6E6].

107. *Cuba Passes Law Allowing Private Home Sales*, BBC NEWS (Nov. 3, 2011), <https://www.bbc.com/news/world-latin-america-15575632> [https://perma.cc/77TE-YULT].

108. Decreto-Ley 288, GACETA OFICIAL, G.O. Ext. No. 35, at 359 (Oct. 28, 2011), available at <http://cafeuerte.com/documentos/1308-documentos-decreto-ley-288-y-resoluciones-para-la-compraventa-de-casas-en-cuba/> [https://perma.cc/3C8D-97Y4]; Damien Cave, *Cuba to Allow Buying and Selling of Property, With Few Restrictions*, N.Y. TIMES (Nov. 3, 2011), <https://www.nytimes.com/2011/11/04/world/americas/cubans-can-buy-and-sell-property-government-says.html> [https://perma.cc/N5CU-7HRF].

109. See Cave, *supra* note 108.

110. *Id.*

111. *Id.*

112. See generally Christopher Palomo, "*Capitalist*" Cuba: The Privatization of the Cuban Economy and Its Unintended Consequences, 24 U. MIAMI INT'L & COMP. L. REV. 195 (2016).

113. Cave, *supra* note 108.



market, people finally have a stake in the economy, which then generates economic activity.<sup>114</sup>

Decree-Law 288 only affects sales to citizens and permanent residents of Cuba, so foreign individuals cannot yet buy homes on the island.<sup>115</sup> However, Raul Castro's reforms have opened up possible future opportunities for foreign property ownership in Cuba. The National Assembly passed Decree-Law 273 in 2010 to promote "the participation of foreign investment in international tourism."<sup>116</sup> This allowed for foreign corporations to enter the country and build up resorts, golf courses, and real-estate developments.<sup>117</sup> It grants the businesses "surface rights," meaning that a business can improve and use a piece of land but the state retains ownership of the land itself.<sup>118</sup> In 2012, Cuba reformed its migration and travel laws, allowing for foreign visitors who are "residents of real estate developments."<sup>119</sup> So while there is no direct provision for foreign citizens to purchase housing in Cuba, there are manners for which people can own and rent homes in housing developments, staying in the country for one-year increments.<sup>120</sup>

Allowing for home ownership created a housing market in Cuba, fostering a free-market economy.<sup>121</sup> Foreign investment and ownership has also served as a boost to the economy.<sup>122</sup> Even though the market is still heavily controlled by the government under these policies, it begins to show a movement away from Socialism. These changes allow for greater personal economic rights and freedoms, a trend that has continued in recent years.

### *C. Constitutional Recognition of Private Property*

Consistent with the continued expansion of economic freedoms in Cuba, the new Cuban Constitution greatly expands on constitutionally

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114. *Id.*

115. Peters, *supra* note 21, at 15.

116. *Id.* at 16.

117. *Id.*

118. *Id.*

119. *Id.* at 17.

120. *Id.*

121. Jill Hamberg, *Cuba Opens to Private Housing but Preserves Housing Rights*, REIMAGINE, <http://www.reimaginerpe.org/node/6930> [<https://perma.cc/MUW8-TAGH>]

122. See Mimi Whitefield, *Foreign Investment in Cuba Might be at Risk if U.S. Allows Lawsuits over Confiscated Property*, MIAMI HERALD (Feb. 20, 2019), <https://www.miamiherald.com/news/nation-world/world/americas/cuba/article221222875.html> [<https://perma.cc/Y4GZ-29YH>].

granted property rights.<sup>123</sup> The property provisions in the Constitution show a desire to abide with socialist economic principles while also creating avenues that foster economic growth in capitalist systems.

The new Cuban Constitution defines seven different types of property ownership: “socialist of all the people,” cooperative, mixed, “of the political, mass and social organizations,” “of institutions and associative forms,” private, and personal.<sup>124</sup> All of these ownership types are founded on socialist policies and communal ownership, except for private and personal ownership. Personal ownership is defined as “exercised over the assets which, without constituting means of production, contribute to the satisfaction of the material and spiritual necessities of their holder.”<sup>125</sup> And private ownership is defined as “exercised over certain means of production, in accordance with what is established.”<sup>126</sup> The final version of the Constitution also emphasized that private property only serves a complementary role in the socialist economy.<sup>127</sup>

Even though the definition of private property in Article 22 does not reference land ownership,<sup>128</sup> Article 29 clearly establishes private-land ownership to be “regulated by a special regime.”<sup>129</sup> The state places further restrictions on private-land ownership, limiting property transfers to the scope of the laws already established.<sup>130</sup> It additionally prohibits any act that would serve as a cession of your individual rights in the property (e.g. leasing, share-cropping, mortgage lending, etc.).<sup>131</sup>

Even though the Constitution recognizes these private rights of ownership, it also places limitations on property rights and allows the state to retain ultimate control.<sup>132</sup> In the next couple years, the National Assembly will likely enact further laws that solidify the scope of these property rights. But if the property rights are further limited, these

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123. *Compare* Constitución de la República [Constitution] Apr. 10, 2019 (Cuba), *translated in* CONSTITUTION OF THE REPUBLIC OF CUBA (Maria del Carmen Gress, trans., HeinOnline World Constitutions Illustrated Library 2019) [hereinafter 2019 Constitution], *with* 1976 Constitution, *supra* note 104.

124. 2019 Constitution, *supra* note 123, art. 22.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* art. 29.

130. 2019 Constitution, *supra* note 123, art. 29.

131. *Id.*

132. *Id.* art. 30.

freedoms will be constricted to a point that won't allow for significant economic growth.

#### IV. PROPERTY OWNERSHIP

##### A. *Traditional Forms of Property Ownership*

Property ownership is typically divided into two major categories: private property and public property.<sup>133</sup> Public property is simply property owned by the state.<sup>134</sup> In capitalist systems, public property often includes things like parks, highways, and streetlamps.<sup>135</sup> They are items owned and controlled by the state and serve for the public benefit of all.<sup>136</sup> Because no individual would expend the cost and energy to maintain a good that he has no individual right in, the government owns and controls these goods.<sup>137</sup> Public property is a bit more all-encompassing in socialist systems, where virtually everything is a public good since everything is owned by the state.<sup>138</sup> Means of production and flow of capital are completely under the state's control.<sup>139</sup> Theoretical Socialism concentrates ownership in the community rather than a state entity.<sup>140</sup> Instead of the traditional state-owned public property, socialist societies have a more fluid concept of communal property and social ownership.<sup>141</sup>

Private property is a bit more nebulous of a concept. Generally, it is considered the ownership of property by non-governmental legal

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133. See John W. Allen, *Private Rights to Property: Private Versus Public Property* Rights, MAYS BUS. SCH., <https://maysweb.tamu.edu/sage/gradescourses/9th-12th-grade/economics/private-rights-to-property/private-rights-to-property-private-versus-public-property-rights/> [https://perma.cc/2Z3R-Q5QE].

134. See *id.*

135. Ron Way, *Democratic Socialism, We're Already Living in It*, STAR TRIBUNE (Oct. 20, 2015), <http://www.startribune.com/democratic-socialism-we-re-already-living-in-it/334832861/> [https://perma.cc/7LPN-T549] (discussing public infrastructure as aspects of capitalist systems).

136. See generally *id.*

137. See Allen, *supra* note 133.

138. Will Kenton, *Socialism*, INVESTOPEDIA (Jun. 25, 2019), <https://www.investopedia.com/terms/s/socialism.asp> [https://perma.cc/UED5-3AF8] [hereinafter Kenton, *Socialism*].

139. *Id.*

140. *Capitalism, Socialism, or Communism*, CULTURE WAR, <http://www.culture-war.info/Socialism.html> [https://perma.cc/J5SW-PSW4].

141. See *id.*

entities.<sup>142</sup> It is typically divided into three categories: personal property, real property, and capital goods. Personal property includes an individual's possessions that were gained in a socially fair manner.<sup>143</sup> This can include clothing, cars, furniture, computers, and any other items acquired for personal use. Real property is typically defined as land and any structures on it.<sup>144</sup> And capital goods include capital (money) and means of production.<sup>145</sup>

### 1. Private Property in Capitalist Systems

Capitalist systems often approach private property with a “bundle of sticks” theory of ownership.<sup>146</sup> This asserts that property rights can be given and taken away in parts or in the entirety.<sup>147</sup> The owner has absolute control over their property and the rights of ownership in the property.<sup>148</sup> Capitalist systems discourage government involvement in property ownership because it takes away from the number of “sticks” that the owner should have with legal ownership of property.<sup>149</sup> The greater amount of rights that the government asserts over a piece of property, the fewer rights the owner has left to enjoy.<sup>150</sup>

Capitalist systems are not only founded on the recognition of private-property rights, but also the legal protection of them.<sup>151</sup> When someone infringes on an individual's ability to fully enjoy their property

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142. CAMPBELL MCCONNELL ET AL., *ECONOMICS*, at G-22 (McGraw-Hill, 18th ed. 2008).

143. See LEGAL ASPECTS OF PROPERTY, ESTATE PLANNING, AND INSURANCE 363 (2012), available at <https://2012books.lardbucket.org/pdfs/legal-aspects-of-property-estate-planning-and-insurance.pdf> [<https://perma.cc/52H6-V59B>].

144. *Objects, Subjects, And Types of Possessory Interests in Property*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/property-law/Objects-subjects-and-types-of-possessory-interests-in-property> [<https://perma.cc/8TDE-83MH>].

145. Kimberly Amadeo, *Capital Goods with Examples and their Effect on the Economy*, THE BALANCE, <https://www.thebalance.com/capital-goods-examples-effect-on-economy-3306224> [<https://perma.cc/P3Q8-GEEG>].

146. See *Property Rights as a Bundle of Sticks*, THE THUGOUT (Sept. 23, 2009), <https://thugout.wordpress.com/2009/09/23/property-rights-as-a-bundle-of-sticks/> [<https://perma.cc/7JB5-NUJP>].

147. *Id.*

148. Will Kenton, *Capitalism*, INVESTOPEDIA, <https://www.investopedia.com/terms/c/capitalism.asp> [<https://perma.cc/EN75-UFGL>] [hereinafter Kenton, *Capitalism*].

149. See generally *id.*

150. See *Property Rights as a Bundle of Sticks*, *supra* note 146.

151. Kenton, *Capitalism*, *supra* note 148.

rights, there is often a legal remedy for that wrong.<sup>152</sup> Thus, capitalist countries require a developed court system to support the enforcement of private property rights.<sup>153</sup>

In a capitalist system, private-property ownership boosts economic activity, encouraging the buying and selling of goods and creating a flow of capital into the market.<sup>154</sup> Private ownership provides incentives for private owners to invest in their property and make it more productive and valuable because they will reap the benefits of doing so.<sup>155</sup> For example, by investing in a house, the owner increases the house's value; the incentive to invest comes from that value. When an owner then sells that house, the increased value of the house goes to the owner and the wealth generated by the increased value can then be used to purchase and invest in other property. The incentive to invest in property is what leads to economic growth.<sup>156</sup> On the other hand, if there are restrictions on what you can do with property, then that incentive is diminished.<sup>157</sup> A large tax on the increased value of property reduces the incentive to invest in it. A ban on sales or a forced sale to the state removes the incentive even more. The potential of private property to lead to growth depends on how and what kind of restrictions the state puts on property.

## 2. Private Property in Socialist Systems

Socialist systems often don't recognize private property, since all ownership rights are held by either the government or community.<sup>158</sup> Traditional understandings of Socialism show a rejection of all private property, and people typically assume this means that you do not have ownership rights in anything.<sup>159</sup> But socialist regimes often let citizens retain control over personal property, like your toothbrush or cell

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152. *Id.*

153. See Sean Ross, *What Role Does the Government Play in Capitalism*, INVESTOPEDIA, <https://www.investopedia.com/ask/answers/040615/what-role-does-government-play-capitalism.asp> [https://perma.cc/62S7-H2SF].

154. See Benjamin Powell, *Private Property Rights, Economic Freedom, and Wellbeing*, MERCATUS CTR., <https://www.mercatus.org/system/files/Private-Property-Rights-Economic-Freedom-and-Well-Being.pdf> [https://perma.cc/G363-H3BH].

155. *Id.*

156. See *id.*

157. *Id.*

158. Kenton, *Socialism*, *supra* note 138.

159. Steven Keekner, *Let's Clear the Air About Socialism*, IMPACT NEWS (Oct. 11, 2018), <https://theimpactnews.com/columnists/tales-of-an-american-redhead/2018/10/11/lets-clear-the-air-about-socialism/> [https://perma.cc/TB3A-U478].

phone.<sup>160</sup> It is the private property that Socialism seeks to abolish. Socialist theorists define private property as anything used by individuals to create profit from someone else.<sup>161</sup> This does complicate certain pieces of property, such as homes and real estate, where they can be used for personal enjoyment as well as profit. Consequently, some of these aspects of Socialism are applied differently depending on the country. Additionally, socialist countries do not have legal systems designed to protect private-property rights because there is no need for this protection.<sup>162</sup>

*B. Cuba's Constitutionally Recognized Forms of Property Ownership*

Cuba's new Constitution recognizes seven different forms of property ownership.<sup>163</sup> The first defined form of ownership is "socialist of all the people."<sup>164</sup> This is described as property ownership where the state owns the property and acts in representation of and to its benefit.<sup>165</sup> This is the typical state-owned property you would expect to see in a socialist system. The second type of ownership is "cooperative," meaning it is collectively owned by multiple proprietary partners and sustained on collective work and the principles of cooperation.<sup>166</sup> In this context, cooperative ownership is used in the workplace, serving as a small-scale socialist environment.<sup>167</sup> Consistent with the renovation Cuba is going through, we see the devolving of state power downwards to lower levels of government and cooperatives.<sup>168</sup> Third is ownership "of the political, mass, and social organizations."<sup>169</sup> Just as it sounds, this property ownership is exercised by these entities over their assets.<sup>170</sup> The most obvious example of this in Cuba is the property owned by the Communist Party. While separate from state-owned property, these

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160. *Id.*

161. *Id.*

162. See Kenton, *Socialism*, *supra* note 138.

163. 2019 Constitution, *supra* note 123, art. 22.

164. *Id.*

165. *Id.*

166. *Id.*

167. Cliff DuRand, *Cooperatives in Socialist Construction*, GRASSROOTS ECON. ORGANIZING (Apr. 28, 2016), <http://www.geo.coop/story/cooperatives-socialist-construction> [<https://perma.cc/96XA-BPQJ>].

168. *Id.*

169. 2019 Constitution, *supra* note 123, art. 22.

170. *Id.*

social organizations are largely interconnected with the government.<sup>171</sup> The fourth type of ownership is “of institutions and associative forms,” which provides for ownership over an entity’s assets that are not being used to produce revenue.<sup>172</sup> This would include property owned by organizations like non-profits or community groups, as long as the assets are used “for the fulfillment of purposes of a non-lucrative character.”<sup>173</sup>

Diverging from more socialist forms of ownership, the fifth type recognized is “personal” property ownership.<sup>174</sup> This ownership is consistent with the normal understanding of personal property. It is the things you own to satisfy material and spiritual necessities, and it does not include any means of production.<sup>175</sup> The sixth—and most important—type of ownership is “private” ownership.<sup>176</sup> Article 22 defines private-property ownership as ownership over the means of production, “in accordance with what is established.”<sup>177</sup> The final version of the Constitution also emphasized that private property only serves a complementary role in the socialist economy.<sup>178</sup> Although this seems like a narrow definition, Article 29 does recognize private ownership of land.<sup>179</sup> This is a huge divergence from past practices in Cuba. This constitutional provision builds on the 2011 statute that allowed for home ownership,<sup>180</sup> taking a monumental stride forward by formally recognizing private property ownership in the Constitution for the first time since 1959.<sup>181</sup> The last type of property ownership is “mixed,” meaning that it is a combination of two or more forms of ownership.<sup>182</sup>

Most of these forms of property ownership seek to advance the socialist goals of the government, but private property is where we see

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171. *See generally Communist Party of Cuba*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/Communist-Party-of-Cuba> [<https://perma.cc/QEW2-KXFG>].

172. 2019 Constitution, *supra* note 123, art. 22.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. 2019 Constitution, *supra* note 123, art. 22.

179. *Id.* art. 29.

180. *See generally* Cave, *supra* note 108.

181. *See* Ortiz, *supra* note 90, at 322.

182. 2019 Constitution, *supra* note 123, art. 22.

a divergence.<sup>183</sup> Normal socialist systems try not to recognize private-property ownership.<sup>184</sup> While it seems that Cuba is trying to encourage economic growth by allowing for privatization in some sectors, it is currently unclear how they plan to recognize these rights while maintaining a socialist government and economy. If Cuba wishes to avoid some of the problems post-communist countries experience with privatization, the Cuban government should look to countries who have gone through this transition before.

## V. THEORIES CONCERNING THE INTERSECTION OF PRIVATE PROPERTY RIGHTS ECONOMIC GROWTH

Over the past few decades, political scientists and economists have started to realize the important relationship between property rights and economic growth.<sup>185</sup> Initially, political scientists focused on the type of political reforms countries were instituting, but over the years, legal recognition and protection of property rights have proven to be vital components for economic growth.<sup>186</sup> This section will first look at how post-communist countries have gone through privatization processes to stimulate economic growth since they abandoned their communist regimes. These countries and theories provide insight into the transition Cuba has been going through since the end of Fidel Castro's regime. The second section will look at the important role that private property rights play in Latin American economies, since Latin America experiences a unique blend of economic circumstances that often make it difficult for capitalist economic policies to take root.<sup>187</sup> Looking at the application of private-property rights across these different systems will give Cuba the best understanding of what methods of privatization lead to the most economic growth.

### A. *Privatization in Post-Communist Countries*

After the collapse of the Soviet Union, twenty-nine countries in Central and Eastern Europe were given the opportunity to reinvent

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183. Frank, *supra* note 53.

184. Kenton, *Socialism*, *supra* note 138.

185. Gerald P. O'Driscoll Jr. & W. Lee Hoskins, *Property Rights: The Key to Economic Development*, CATO INST. (Aug. 7, 2003), <https://www.cato.org/publications/policy-analysis/property-rights-key-economic-development> [<https://perma.cc/K6SZ-DGKC>].

186. *See generally* Paul H. Rubin, *Growing a Legal System in the Post-Communist Economies*, 27 CORNELL INT'L L.J. 1 (1994).

187. *See generally* DE SOTO, *supra* note 25.



their institutional frameworks.<sup>188</sup> They implemented a variety of economic and political reforms to structure their countries, with varying degrees of success.<sup>189</sup> These post-Soviet countries have served as excellent examples of countries who have implemented property-rights reforms in the transition from a socialist, state-planned economy to a capitalist, market economy.<sup>190</sup>

1. Constitutional Provisions Protecting Property Rights

Every post-Soviet country either wrote a new Constitution or reinstated a modified version of the Constitution that was in place before they were absorbed into the Soviet Union.<sup>191</sup> Sixteen of these countries implemented Constitutions that had clear protections of property rights, though each country also placed some sort of limitation on the right to private property.<sup>192</sup> The property-rights provisions were typically vague, leaving the government with significant power to handle property ownership how they wished.<sup>193</sup> These flexible provisions undermined the legal right to property ownership.<sup>194</sup> If the scope of legal recognition and protection of property rights can be controlled by political choices, these limitations counteract any benefit of the constitutional protection of property rights.<sup>195</sup>

After the fall of the Soviet Union, countries like Estonia, Moldova, and Ukraine, provided very strong constitutional provisions protecting property rights, but also limited the use of private property.<sup>196</sup> While some countries fall in the middle with weaker constitutional provisions on property rights,<sup>197</sup> the Czech Republic is at the opposite end of the

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188. Christian Bjørnskov, *Constitutional Property Rights Protection and Economic Growth: Evidence from the Post-Communist Transition*, RATIO INST., at 6 (Mar. 16, 2012).

189. *See id.* at 6–7.

190. While this paper recognizes that other communist countries bear significant resemblances to Cuba, they have fundamental differences that would render comparisons irrelevant. China is an excellent example of a country who has adopted capitalist economic policies but still has a political system controlled by the communist party. But China also enjoys the second-largest population in the world, a mass amount of resources, and healthy foreign investment. Cuba does not have the population or resources to undergo the mass industrialization that China did.

191. Bjørnskov, *supra* note 188, at 6.

192. *Id.* at 20.

193. *Id.* at 20–21.

194. *Id.* at 21.

195. *See id.*

196. *Id.* at 7.

197. Bjørnskov, *supra* note 188, at 7.

spectrum with a constitution that does not even mention private ownership or property rights.<sup>198</sup> The Czech Republic *does* recognize private-property rights, just not through their Constitution; private property is protected by statutes and judicial norms.<sup>199</sup> Despite the lack of constitutional provisions protecting private property, the Czech Republic has some of the highest levels of property rights protection and has experienced one of the largest rates of economic growth since the fall of the Soviet Union.<sup>200</sup>

In contrast, Ukraine, whose Constitution has strong protections of property,<sup>201</sup> remains one of the poorer countries in Europe with higher levels of inequality than other post-communist countries.<sup>202</sup> There are several theories for why Ukraine's constitutional property protections did not lead to economic growth. It might be because the governmental restrictions placed on property rights undermined the grant of legal protection. It might be because Ukraine's gradual reformation process<sup>203</sup> did not put necessary institutions in place quickly and early-on to establish a system of property ownership. It might be because Ukraine formally recognized private-property rights without building up informal structures to enforce societal recognition of these rights and protect them at a local level. While constitutions are an important tool for laying out the framework of a country, constitutional recognition of property rights without complementary reforms in other sectors will not lead to economic growth.

## 2. Formal Versus Informal Recognition of Private Property Rights

Post-communist countries can make as many large-scale, constitutional property-rights reforms as they wish, but some economists theorize that economic growth will not occur until there is change in the community, local courts, and civil society.<sup>204</sup> Formal

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198. See ÚSTAVA ZÁKON Č. [CONSTITUTION], Jan. 1993 Sb., (Czech Republic), *translated in* English translation of Constitution of the Czech Republic of 6 December 1992, 1/1993 Sb., as amended to Constitutional Act 98/2013 Sb. [1] (1993).

199. Bjørnskov, *supra* note 188, at 7.

200. *Id.* at 7–8.

201. *Id.* at 7.

202. Aleksander Kuczabski & Tomasz Michalski, *Ukrainian Post-Communist Transformation: Causes, Consequences and Threats*, 33 *QUAESTIONES GEOGRAPHICAE* 171 (2014).

203. Marian Tupy, *Countries That Transitioned Rapidly from Communism to Capitalism Fare Better*, *REASON* (July 19, 2016), <http://reason.com/archives/2016/07/19/countries-that-transitioned-rapidly-from> [https://perma.cc/854C-H778].

204. See generally Javad Bahmani, *The Role of Civil Society in Development*, 5 *J. CIVIL LEGAL SCI.* 1 (2016).

institutions include rules that show depth and durability, such as constitutions or democratically-enacted laws.<sup>205</sup> On the other hand, informal institutions are rules that shape human behavior, but are outside of government control.<sup>206</sup> In its most simplified form, informal institutions are the culture of a country.<sup>207</sup> Informal institutions include private mechanisms that exist to protect and secure property.<sup>208</sup>

Legislatures can adopt formal civil codes to force a new legal system in a country.<sup>209</sup> But a more favored route is allowing the common-law process to gradually recognize private-property rights and build a legal framework for protecting those rights while the political system stabilizes.<sup>210</sup> Studies have shown that culture positively affects property protection, while formal institutions have no impact on the level of property protection in countries.<sup>211</sup> Informal institutions might be the primary mechanism for securing private property protection in post-socialist countries.<sup>212</sup> Granted, this does not render formal institutions invalid, as formal-institution reforms are often aimed to bring changes to informal institutions.<sup>213</sup> But there will be little economic growth flowing from the protection of private-property rights unless there are societal shifts and reforms that accompany large-scale policy changes.

As seen in the Czech Republic, formal constitutional provisions are not necessary to benefit from the economic growth that private-property rights can bring.<sup>214</sup> But because they had political, civil, and legal reforms that accompanied economic reforms,<sup>215</sup> there was a balance between the formal recognition of private property and the informal protection and enforcement of it on a local and practical scale. The protection of private-property rights through informal institutions is essential to economic growth in post-socialist countries.

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205. Claudia R. Williamson & Carrie B. Kerekes, *Securing Private Property: Formal versus Informal Institutions*, 54 J. OF L. & ECON. 537, 545 (2011).

206. *Id.* at 546.

207. *See id.*

208. *Id.*

209. Rubin, *supra* note 186, at 9 (stating that there are two major methods deriving the law governing private relations, one of which is the adoption of formal civil codes through legislation).

210. *See id.* at 10.

211. Williamson & Kerekes, *supra* note 205, at 559.

212. *Id.*

213. *See id.* at 553.

214. *See* Bjørnskov, *supra* note 188, at 7.

215. *See* Tupy, *supra* note 203.

### 3. Speed of Reforms

A recent study has shown that the speed of transition also plays a significant role in post-communist countries.<sup>216</sup> Former Soviet countries who have undergone a process of rapidly adopting capitalist economic regimes have fared better over the past 25 years.<sup>217</sup> While the beginning of the transition is often chaotic and leads to an increased risk of corruption, countries who transitioned rapidly have grown richer and more democratic, while experiencing less impoverishment and a smaller increase in income inequality.<sup>218</sup> Other countries have adopted a more gradual approach, but they have all performed worse economically, socially, and democratically.<sup>219</sup> Unfortunately, there is this misperception that rapid reform leads to severe human suffering, and even though rapid transitions are difficult at the beginning, they prove more beneficial over time.<sup>220</sup>

When initial reforms occur, there also need to be structures in place to accommodate those reforms.<sup>221</sup> If large-scale recognitions of property rights do not occur alongside the development of institutional methods for protecting those rights, the economic market will not benefit from private-property ownership.

The Czech Republic is unique in that it initiated several policies up front and sustained them over time.<sup>222</sup> Their reforms focused on the creation of democratic political institutions and processes, the transformation of state-planned economies into market economies, the gradual introduction of the rule of law, and the growth of a civil society.<sup>223</sup> These reforms shaped everything from local recognition of property rights to statutory protection of private property.<sup>224</sup>

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216. Oleh Havrylyshyn et al., *25 Years of Reforms in Ex-Communist Countries: Fast and Extensive Reforms Led to Higher Growth and More Political Freedom*, CATO INST. (Jul. 12, 2016), <https://www.cato.org/publications/policy-analysis/25-years-reforms-ex-communist-countries-fast-extensive-reforms-led> [<https://perma.cc/KD33-9LCN>].

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. See Williamson & Kerekes, *supra* note 205, at 559.

222. Tupy, *supra* note 203.

223. See *id.*

224. See generally THE SCOPE AND STRUCTURE OF CIVIL CODES (Julius Cesar Rivera ed., 2013).

Alternatively, Russia continued to enforce socialist policies in their country for decades after the fall of the Soviet Union.<sup>225</sup> Instead of rapidly reforming, Russia adopted several reforms early on, but then abandoned or reversed some of those reforms.<sup>226</sup> By 1998, Russia faced economic collapse.<sup>227</sup> Ukraine has gone through an even slower reform process, stretching out its gradual changes over the past 25 years.<sup>228</sup> Ukraine's initial constitutional recognition of property rights was not quickly followed by the establishment of institutions to protect those rights, so the economy did not benefit from the creation of that right.

It is important to note that other prominent theorists argue that the creation of a market economy does not need to be done quickly.<sup>229</sup> Gradually privatizing and creating market institutions could avoid a political backlash against reformers, leading to less pain in the short run and greater stability and economic growth in the long run.<sup>230</sup> Slovenia serves as an example of a country who privatized more gradually yet achieved sustainable economic growth.<sup>231</sup> Because observing the speed of reforms alone can lead to varying results, it is important to look at the rate of reform alongside the manner that reforms were carried out.

#### 4. Methods of Privatization

Post-Soviet countries went through different processes of privatizing previously state-owned property.<sup>232</sup> State-owned enterprises (SOE's) are distinct legal entities that are owned by the government and engage in commercial, industrial, or financial activities involving the production and sale of economic goods or services;<sup>233</sup> SOE's are

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225. Tupy, *supra* note 203.

226. See Anders Aslund, *Why has Russia's Economic Transformation Been So Arduous?*, CARNEGIE ENDOWMENT FOR INT'L PEACE, (Apr. 28, 1999), <https://carnegieendowment.org/1999/04/28/why-has-russia-s-economic-transformation-been-so-arduous-pub-201> [<https://perma.cc/XW8W-9Q2P>].

227. Abbigail J. Chiodo & Michael T. Owyang, *A Case Study of a Currency Crisis: The Russian Default of 1998*, FED. RES. BANK OF ST. LOUIS, 7 (2002), <https://files.stlouisfed.org/files/htdocs/publications/review/02/11/ChiodoOwyang.pdf> [<https://perma.cc/Z83A-CTYL>].

228. Kuczabski & Michalski, *supra* note 202.

229. Simeon Djankov, *The Divergent Postcommunist Paths to Democracy and Economic Freedom*, Discussion Paper No. 758, at 3 (Peterson Inst. for Int'l Econ., Jul. 2016).

230. *Id.*

231. *Id.*

232. Savas, *supra* note 10, at 573.

233. *Id.*

fundamental to socialist systems.<sup>234</sup> In Soviet countries, SOE's comprised roughly 85% of the economy, as compared to capitalist countries where SOE's make up about 9% of the economy.<sup>235</sup> When post-socialist countries decide to transition to a capitalist economic system, they have to decrease the number and involvement of SOE's in their economy. This process is typically done through privatization of state-owned assets.<sup>236</sup>

Privatization can occur through three different methods: (1) divestment; (2) displacement; and (3) delegation.<sup>237</sup> Divestment means removing an asset or enterprise by selling it, giving it away, or liquidating it.<sup>238</sup> Displacement is a more passive process where state involvement gradually dissipates, and markets develop to satisfy needs that SOE's are no longer fulfilling.<sup>239</sup> Displacement can either occur through default—where the public finds that government provisions are inadequate and fill the gap—or through withdrawal—where the government shuts down a failing enterprise.<sup>240</sup> The last method of privatization is delegation, where the government delegates the activity of producing goods or services to the private sector but retains the responsibility of overseeing the result.<sup>241</sup> Delegation often serves as an intermediate step before divestment.<sup>242</sup>

Unfortunately, the process of privatization in post-socialist countries faces several hurdles. Janusz Lewandowski, Poland's Minister for Ownership Changes, summarized the difficulties post-socialist countries face, stating that, "privatization is the sale of enterprises that no one owns, and whose value no one knows, to buyers who have no money."<sup>243</sup> One hurdle is determining ownership of this property.<sup>244</sup> Many of the state-owned assets being privatized once belonged to citizens before they were expropriated.<sup>245</sup> New post-socialist states must determine how and if they choose to recognize old ownership rights and

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234. Kenton, *Socialism*, *supra* note 138.

235. Savas, *supra* note 10, at 574.

236. *See id.* at 573.

237. *Id.*

238. *Id.* at 574.

239. *See id.* at 575.

240. *Id.*

241. Savas, *supra* note 10, at 576.

242. *Id.*

243. *Id.*

244. *Id.* at 577.

245. Frances H. Foster, *Restitution of Expropriated Property: Post-Soviet Lessons for Cuba*, 34 COLUM. J. TRANSNAT'L L. 621, 627 (1996).

award restitution for being deprived of property.<sup>246</sup> Next, they must determine the value of and sell SOE's.<sup>247</sup> Because there was no market for these enterprises before, there is no guide for how these assets should be valued.<sup>248</sup> And then the state is trying to sell them to a population that doesn't have the wealth or economic capacity to purchase assets.<sup>249</sup>

Poland, the Czech Republic, Lithuania, Estonia, and Romania attempted to remedy these problems through the free transfer of shares in SOE's to all citizens.<sup>250</sup> This process was fair, easy, quick, and accessible to citizens who did not have capital to purchase assets.<sup>251</sup> On the other hand, these shares were viewed as gifts instead of investment opportunities and often did not lead to the formation and growth of a market economy.<sup>252</sup>

Other post-Soviet countries have taken a decentralized approach to privatization.<sup>253</sup> Instead of mass, nation-wide privatization, countries like Slovakia, Slovenia, and the Czech Republic implemented administrative avenues for privatization of SOE's.<sup>254</sup> Plans for privatization of business could be submitted to agencies, who looked over the plans for privatizing and helped establish a business that will contribute to the economy.<sup>255</sup>

Privatization in post-socialist countries is a difficult process, but a few former-Soviet countries have undergone successful privatization processes and are now experiencing economic growth in a market economy.

## 5. Legal Systems and Property Rights

Once private-property rights are granted and citizens possess property, there needs to be a mechanism to protect these property interests. Court systems are fundamental to support the recognition and protection of private-property rights in post-socialist countries.<sup>256</sup>

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246. *See id.*

247. Savas, *supra* note 10, at 578.

248. *Id.*

249. *Id.*

250. *Id.*

251. *See id.*

252. *Id.*

253. Savas, *supra* note 10, at 579.

254. *Id.*

255. *Id.*

256. *See generally The Fundamental Right to Use One's Own Property*, LIBERTAS INST., <https://libertasutah.org/policy-papers/property-rights.pdf> [<https://perma.cc/KKW9-CYEA>].

Most post-communist countries base their legal systems on civil codes instead of common-law rulings by judges.<sup>257</sup> The lawyers and policymakers who draft civil codes must have knowledge of both local conditions and capitalist legal theories of property rights.<sup>258</sup> Policymakers won't have an adequate grasp on what laws are needed to adequately protect and encourage private-property ownership until after capitalist ownership policies have been implemented.<sup>259</sup> Thus, judges and courts serve this function of enforcing property-right protections, acting after initial policies have been implemented. Courts make decisions about the day-to-day functions of property rights that arise out of the dispute-resolution process.<sup>260</sup>

National legislatures can enact civil codes to govern property rights, but they will be the most successful when they work with the judicial system to bring property-right protection through a common-law system.<sup>261</sup> Court systems define the local, informal institutions that are so vital to protecting property rights and encouraging economic growth. Each of the factors previously discussed, and many more, play a role in determining how to best implement private property rights in order to facilitate economic growth. But the struggles facing post-socialist countries are not the only factors Cuban policymakers must take into consideration.

*B. Private Property Rights in Latin American Countries*

Latin America is comprised of states that experience the highest rates of wealth inequality, low development rates, and fluctuating GDP's that fall well below developed countries.<sup>262</sup> Cuba shares these unique characteristics of Latin American countries, further complicating Cuba's road to post-socialist economic growth. Economists theorize that the key to economic development in Latin America lies in the recognition and protection of private-property rights.<sup>263</sup>

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257. Rubin, *supra* note 186, at 9.

258. *Id.* at 10.

259. *See id.*

260. *Id.*

261. *See id.*

262. *High Levels of Inequality in Latin America Constitute an Obstacle to Sustainable Development*, ECON. COMM'N FOR LATIN AM. AND THE CARIBBEAN (May 30, 2017), <https://www.cepal.org/en/pressreleases/eclac-high-levels-inequality-latin-america-constitute-obstacle-sustainable-development> [https://perma.cc/AS8T-NF93].

263. *See generally*, DE SOTO, *supra* note 25.



1. Inability to Produce Capital

Many people are led to believe that the citizens of Third World countries are oppressed beggars, trapped in obsolete practices.<sup>264</sup> But this is far from the case. Latin American countries are overflowing with entrepreneurs that already possess the assets needed to form a successful capitalist system.<sup>265</sup> The reason that the majority of the world is not benefiting from Capitalism is that they lack the ability to produce capital.<sup>266</sup>

Even the poorest countries in Latin America have the assets necessary to jump-start a capitalist market economy, but they own these assets in defective forms.<sup>267</sup> Houses are built on land with unrecorded ownership rights.<sup>268</sup> Entrepreneurs own unincorporated businesses without proper liability protection.<sup>269</sup> Businesses and industries are located where investors cannot be made aware of them.<sup>270</sup>

In Western countries, every parcel of land is recorded, every business must meet legal requirements, and every enterprise has the opportunity for investment.<sup>271</sup> The creation of capital in these countries began when they established widespread, formal property law that equipped every citizen with the ability to participate in the market system.<sup>272</sup> Formal private-property rights give low-income citizens a stake in the market system, providing an opportunity to invest in and develop their assets.<sup>273</sup>

Latin American countries are stuck in a cycle where they cannot produce capital to invest in the economy because there is no formal legal recognition of the capital they already possess.

2. Formal Recognition of Property Rights

As a region, Latin America experiences the highest rates of income inequality in the world.<sup>274</sup> By establishing formal property rights,

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264. *Id.* at 4.

265. *Id.* at 4–5.

266. *Id.* at 5.

267. *Id.*

268. *Id.* at 5–6.

269. DE SOTO, *supra* note 25, at 6.

270. *Id.*

271. *See id.*

272. *Id.* at 10.

273. *See generally id.*

274. *See generally High Levels of Inequality in Latin America Constitute an Obstacle to Sustainable Development*, *supra* note 262.

governments give their citizens a stake in the economy, a means to invest and participate.<sup>275</sup>

Peru is one of the most economically stable Latin American countries.<sup>276</sup> And their growth directly flowed out of Peru's success in reforming and improving their property rights.<sup>277</sup> Economic reforms moved Peru's street vendors, transportation workers, low-income farmers, and millions of other participants in the informal sector into the legalized economy.<sup>278</sup> Coupled with policy reforms—like simplifying administrative processes, improving access to public information, unifying business registries, and democratizing rule-making—Peru has seen significant economic growth flowing from the recognition of private-property rights and integration of low-income participants into the economy.<sup>279</sup>

Alternately, Brazil has demonstrated minimal economic growth in the last decade, since their system does not grant full property rights.<sup>280</sup> Brazilian law punishes owners if their property does not serve a “social function,” which weakens the importance and value of private property.<sup>281</sup> Owners are obligated to make their property productive, in accordance with the state's criteria.<sup>282</sup> In Brazil, state intervention clearly has a negative impact on the economy, and the lack of legal security in property rights scares investors away.<sup>283</sup>

Many developing countries have the assets required to support a capitalist market economy,<sup>284</sup> but economic growth will not occur until property rights are formally recognized. Without a proper stake in the economy, individuals will not invest in or develop their assets in a manner that stimulates growth.

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275. Moisés Rendón, *Latin America Can Slash Poverty with Property Rights*, PANAM POST (Mar. 13, 2016), <https://panampost.com/editor/2016/03/13/latin-america-can-slash-poverty-with-property-rights/?cn-reloaded=1> [https://perma.cc/H6D2-9PRT].

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*; Alexandre dos Santos Cunha, *The Social Function of Property in Brazilian Law*, 80 FORDHAM L. REV. 1171, 1174 (2011).

281. Rendón, *supra* note 275.

282. *Id.*

283. *Id.*

284. DE SOTO, *supra* note 25, at 5.

## VI. RECOMMENDATIONS FOR CUBA

In the wake of implementing a new Constitution, the Cuban government has a responsibility to provide further structure and guidance for its constitutional provisions.<sup>285</sup> Cuba's monumental recognition of private-property rights will be futile without further reforms to protect and define that right. Because of Cuba's socialist system and current economic predispositions, the path to sustainable economic growth will be difficult. But, by looking at past experiences of countries who have gone through similar processes, we can learn about potential obstacles that Cuba might face and provide recommendations for transitioning to an economically healthy private-property system.

### A. *Challenges Cuba Faces*

No other country in the world has been in the exact same position Cuba is in right now. Post-Soviet countries benefited from being able to start from scratch in building a new institutional framework.<sup>286</sup> Whereas Cuba seems to be gradually transitioning out of an existing political and economic system. Successful Latin American countries laid out the framework for capitalist market economies before going through property-rights reform.<sup>287</sup> Whereas Cuba is trying to imbue their socialist economy with capitalist mechanisms for growth.

When it comes to privatization, Cuba is not seeking to relinquish all control over the means of production. Even their Constitution still establishes state and communally-owned property as the favored form of ownership.<sup>288</sup> While there might not be the mass privatization movement that Soviet countries experienced,<sup>289</sup> Cuba is undergoing small-scale privatizations.<sup>290</sup> Over the last 10 years, Cuba has laid off surplus state labor and expanded private-sector business licenses.<sup>291</sup> While they hoped that this would help grow the private sector of the economy, the practical and legal restrictions on market access have strangled this opportunity for growth.<sup>292</sup> But these reforms occurred before both the statutory creation of ownership rights in homes and the

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285. See Rodriguez, *supra* note 17.

286. See Bjørnskov, *supra* note 188, at 7.

287. See generally DE SOTO, *supra* note 25.

288. 2019 Constitution, *supra* note 123, art. 22.

289. Savas, *supra* note 10, at 573.

290. See generally Palomo, *supra* note 112.

291. *Id.* at 198.

292. *Id.* at 199.

constitutional recognition of private property.<sup>293</sup> If Cuba follows through with reinforcing and protecting property rights, they might be able to remedy this problem, because private-property rights give individuals the capital to invest in the market.<sup>294</sup>

Legalizing private property comes with a whole new set of problems. In Cuba's housing sector, residences have been owned by single families for generations without proper recording, and many of the property transfers that occurred before 2011 were illegal transfers.<sup>295</sup> Further, the Cuban government continually fails to provide a remedy for property expropriated under the Castro regime, especially for Cuban exiles living abroad.<sup>296</sup>

The systems Cuba currently has in place create property rights, but the amount of restrictions on those rights discourages individuals from using their assets in the market. And without market activity, Cuba will not experience economic growth as a result of granting private-property rights.

### *B. Problems to Avoid*

Although there is no guidebook for how to successfully implement property rights and capitalist economic reforms in a socialist country, there are some major pitfalls that Cuba should be aware of. While Cuba is already experiencing many of these issues, improperly stewarding the implementation of property rights may lead to these problems worsening. The central goal of recognizing private-property rights is to encourage market participation and help expand the middle class.<sup>297</sup> If property reforms are implemented without methods for protection or stabilization, Cuba could face greater wealth inequality or the creation of a plutocracy. And there is always the danger that they could regress back to comfortable socialist economic policies.

#### 1. Wealth Inequality

Although we do not have data on the current level of income inequality in Cuba, experts theorize that Cuba has one of the highest

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293. *Id.* at 197. *See also* 2019 Constitution, *supra* note 123, art. 22.; Decreto-Ley 288, GACETA OFICIAL, G.O. Ext. No. 35, at 359 (Oct. 28, 2011), accessible at <http://cafeuerte.com/documentos/1308-documentos-decreto-ley-288-y-resoluciones-para-la-compraventa-de-casas-en-cuba/> [<https://perma.cc/H9YB-UCKX>].

294. *See generally* Palomo, *supra* note 112.

295. *See generally* Peters, *supra* note 21.

296. *See* Nicolás J. Gutiérrez Jr., *The De-Constitutionalization Of Property Rights: Castro's Systematic Assault on Private Ownership In Cuba*, 5 U. MIAMI INT'L & COMP. L. REV. 51 (2015).

297. *See* Kenton, *Capitalism*, *supra* note 148.

rates of economic inequality in the world.<sup>298</sup> Their population is divided between the low-income working class and the wealthy political elite (typically officials in the Communist Party).<sup>299</sup> There is virtually no middle class in Cuba, and many other Latin American countries suffer from the same problem.<sup>300</sup>

If Cuba begins to privatize property without creating specific provisions that welcome low-income citizens into the economy with incentives to invest and participate, it will not experience economic growth. The lower class will sell their assets to the upper class for short-term gain, relinquishing the ability to participate in the market in the future. The rich will become richer and the poor will become poorer. Peru's reforms were so successful because they welcomed low-income entrepreneurs into the formal economic market.<sup>301</sup> The government did not merely provide the opportunity to participate, they *rewarded* investment in the market.<sup>302</sup> Granting private-property rights without further provisions for effective participation in the market will lead to higher rates of income inequality and will not serve the purpose the reforms originally intended.

## 2. Creation of a Plutocracy

Going hand-in-hand with increased economic inequality is the risk of the creation of a plutocracy. A plutocracy is a system of government controlled exclusively by the wealthy, either directly or indirectly.<sup>303</sup> These systems can arise inadvertently, and many Latin American countries trend towards this "rule by the wealthy."<sup>304</sup>

If Cuba enters a cycle where low-income citizens sell their assets to the wealthy elite and fail to further participate in the economy, the

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298. Audiotape: Maria Werlau, Communism in Cuba and North Korea, Lecture given at Case Western Reserve University (Oct. 18, 2018) (on file with author).

299. *Id.*

300. See George Gao, *Latin America's Middle Class Grows, But in Some Regions More Than Others*, PEW RES. CTR. (Jul. 20, 2015), <http://www.pewresearch.org/fact-tank/2015/07/20/latin-americas-middle-class-grows-but-in-some-regions-more-than-others/> [<https://perma.cc/HU7M-8CSM>].

301. Rendón, *supra* note 276.

302. See *id.*

303. Will Kenton, *Plutocracy*, INVESTOPEDIA (Jun. 20, 2018), <https://www.investopedia.com/terms/p/plutocracy.asp> [<https://perma.cc/T3LT-9WUX>] [hereinafter Kenton, *Plutocracy*].

304. W.W., *This Ain't No Banana Republic, A High Level of Income Inequality May or May not Reflect Injustice or Plutocracy*, ECONOMIST (Nov. 19, 2010), <https://www.economist.com/democracy-in-america/2010/11/19/this-aint-no-banana-republic> [<https://perma.cc/ZA4H-VN94>].

wealthy are left with complete market control. Cuba's political system is currently controlled exclusively by the Communist Party.<sup>305</sup> And the majority of Cuba's wealth is concentrated in its Communist Party members.<sup>306</sup> Without a balance in market participation, all of Cuba's wealth and political power would concentrate in the hands of a few hundred individuals, most of whom have some level of political influence.

While it may seem like Cuba already has this system in place, their current policies at least recognize the struggles of the lower class and seek to remedy the distance between the working class and political elite. The formation of a plutocracy would lead to the elimination of the lower class's involvement in the economy.<sup>307</sup> And sustainable economic growth is not possible without widespread participation in the market economy.

### 3. Regression to Socialist Policies

Cuba took a bold step towards capitalist economic principles in their new Constitution. But even the differences between the first draft of the constitution and the ratified version showed Cuba was shrinking away from their initial trajectory.<sup>308</sup> While socialist economic policies in Cuba have not been successful, they are familiar. If their attempts at capitalist reforms do not lead to economic growth in Cuba, the government may choose to return to its socialist roots.

Russia underwent a very similar pattern, making several economic reforms up front, but then returning to some of their socialist principles.<sup>309</sup> This regression made it incredibly difficult for Russia to establish a market economy and promote economic growth.<sup>310</sup> If Cuba backtracked on economic reforms, it would only lengthen the process and impose greater burdens on the economy. Continual reforms might create unpredictability in the short-term, but it will lead to growth and stability over time.

### C. How to Best Facilitate Growth

If Cuba seeks to benefit from the work it has already done with recognizing private-property rights and attempting to build new sectors

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305. *Communist Party of Cuba*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/Communist-Party-of-Cuba> [https://perma.cc/2N8W-VGAM].

306. Audiotape: Maria Werlau, Communism in Cuba and North Korea, Lecture given at Case Western Reserve University (Oct. 18, 2018) (on file with author).

307. Kenton, *Plutocracy*, *supra* note 303.

308. Acosta & Marsh, *supra* note 75.

309. Tupy, *supra* note 203.

310. *Id.*

of the economy to facilitate growth, the reforms cannot stop here. In the past, Cuba has tried to encourage economic participation without providing the assets to effectively invest and grow in the market.<sup>311</sup> Now, Cuba is granting rights to establish those assets, but has yet to implement any further framework for protection or implementation of those rights. In order for Cuba to experience economic growth from formally recognizing private-property rights, the government will need to quickly enact laws and establish informal institutions to protect those rights and encourage their use in the market.

### 1. Amend Laws to Reinforce Private Property Rights

Constitutional recognition of private-property rights is an important tool to provide guidance for economic growth. But as seen in Ukraine, formal recognition alone is not enough to protect property rights in a manner that will encourage growth.<sup>312</sup> If Cuba wants to benefit from the allowance of private property, it should accompany its constitutional provisions with laws that establish a framework for protecting and enforcing private-property rights.

Private property is not part of the society in Cuba, and societal change is necessary for the protection and recognition of private-property rights.<sup>313</sup> While the government cannot require people to change their opinions, they can implement policies that lead to transformations in informal institutions. By strengthening property rights through small-scale provisions and local reforms, the state can reinforce the importance of private property so that it eventually becomes a recognized value in society.

Cuba needs to create a framework that supports and protects private-property rights. At the same time, Cuba needs to decrease restrictions on property ownership and use, since limitations on property use disincentivize activity in the market.<sup>314</sup> Once Cuba expands protections and decreases limitations on property rights, citizens will have the incentive to invest their assets in the market, leading to economic growth.

### 2. Expand Economic Policies that Promote Privately-Owned Enterprises

While individual property rights are a decent starting point, significant economic growth will arise from the development of privately-owned businesses and the encouragement of

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311. See Palomo, *supra* note 290, at 200.

312. See Bjørnskov, *supra* note 188, at 7–8.

313. See Williamson & Kerekes, *supra* note 205, at 559 (insinuating that countries—like Cuba—who implement this system are in need of societal reformation).

314. Powell, *supra* note 154, at 2.

entrepreneurship.<sup>315</sup> Recent developments in business regulation have been all over the board in Cuba, but the most recent set of reforms severely limit business owners' ability to effectively participate in the market.<sup>316</sup>

Peru experienced economic growth by formally recognizing informal business operations.<sup>317</sup> The Czech Republic underwent a successful process of privatization by legitimizing small, private business operations that had previously been under state control.<sup>318</sup> Granting businesses greater freedoms encourages economic growth. Even if individuals have the legally protected assets to invest in the market, they will not get involved in the market if the government's limitations on property place high burdens on economic participation. In order to foster economic growth propelled by privately-owned businesses, the Cuban government should decrease the amount of restrictions it places on these business enterprises.

### 3. Develop a Legal System that Protects Private Property Rights

Cuba's current court system does not afford any protection for property rights because under the socialist system, there was no need to protect private property.<sup>319</sup>

Cuba typically relies on civil codes for guidance on how the courts should rule and operate.<sup>320</sup> But courts are one of the most important institutions in effecting societal change. Legislatures can make decisions at the national level, but it is the court's application of laws that will impact the everyday lives of citizens.<sup>321</sup> Cuba should approach property-rights protections through the use of common law rulings.

Legal protection of private property and recognition of those rights in Cuba's courts of law will provide citizens with the assurance and incentive to use their assets in the market. When property rights receive legal protection, economic growth follows.<sup>322</sup> If Cuban courts can successfully establish the protection of private-property rights through common-law rulings, Cuba will be one step closer to economic growth.

## CONCLUSION

Cuba's new Constitution formally recognizes private property as a form of ownership, setting the stage for economic growth and

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315. *Id.*

316. Palomo, *supra* note 290, at 199.

317. Rendón, *supra* note 276.

318. Savas, *supra* note 10, at 579–80.

319. *See* Kenton, *Socialism*, *supra* note 138.

320. Rubin, *supra* note 186, at 9.

321. *See id.* at 10.

322. *See Id.*



participation in a capitalist market system. However, constitutional recognition of property rights alone will not bring the growth Cuba is seeking. In order for Cuba to benefit from the economic growth that private-property rights bring to capitalist systems, Cuba should: (1) implement policies that create a framework for the protection and societal recognition of property rights; (2) reduce restrictions on how individuals and business use their privately-owned assets in the market; and (3) develop a legal system that safeguards private-property rights. Cuba is in a unique position to bring about economic growth in their nation. They have made the first step of recognizing private-property rights. But we will have to wait and see what the future holds for Cuba.